IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-713

RICHARD E. GERSTEIN, and ROBERT L. SHEVIN,
Appellants,

v.

NANCY COE, PATRICIA NOE, and DR. LYNN P. CARMICHAEL, *et al., Appellees.*

On Appeal From the United States Court of Appeals for the Fifth Circuit

MOTION TO AFFIRM AND BRIEF

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MOTION TO AFFIRM

Appellees respectfully move this Court to affirm the judgment below of the United States Court of Appeals for the Fifth Circuit upon the ground that the spousal and parental consent requirements of the Florida abortion law, FLA. STAT. ANN. § 458.22, vio-

late fundamental personal rights of privacy and equal protection, protected by the Fourteenth Amendment, and are inconsistent with *Roe* v. *Wade,* 410 U.S. 113 (1973), and *Doe* v. *Bolton,* 410 U.S. 179 (1973).

Respectfully submitted,

ROY LUCAS
Attorney for Appellees.

Of Counsel:

JOSEPH P. FARINA

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BRIEF IN SUPPORT OF MOTION TO AFFIRM

Appellees respectfully submit this brief in support of the motion to affirm.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit has been officially reported as *Poe* v. *Gerstein,* 517 F.2d 787 (5th Cir. 1975).

QUESTIONS PRESENTED

I.

Whether the spousal consent provision of the Florida abortion law, FLA. STAT. ANN. § 458.22, invades a pregnant married woman's individual Fourteenth Amendment right of privacy by authorizing the spouse, for any arbitrary reason or none at all, to veto her access to necessary medical care, regardless of rape, medical needs, impending divorce, or her physical and mental condition?

II.

Whether the parental consent provision of the Florida Abortion law, FLA. STAT. ANN. § 458.22, invades a pregnant minor woman's individual Fourteenth Amendment right of privacy by authorizing her parents, for any arbitrary reason or none at all, to veto her access to necessary medical care, regardless of rape, incest, her medical needs, or personal maturity?

STATEMENT OF THE CASE

Four pseudonymous pregnant women and Dr. Lynn P. Carmichael, Chairman of the Department of Family Medicine at the University of Miami School of Medicine, brought this class action to contest the spousal and parental consent provisions of the Florida abortion law, FLA. STAT. ANN. § 458.22.

Paula Poe and Nancy Coe, at the time of filing, were pregnant married women desirous of obtaining abortions, but opposed by their spouses. Paula Poe was staying away from her husband to avoid physical brutality. Nancy Coe, too, had been beaten by her husband who threatened to have her criminally prosecuted if she obtained an abortion.

Rita Roe and Patricia Noe, at the time of filing, were under the age of 18, pregnant, living with their respective parents, and desirous of obtaining abortions without the threat of parental veto. The parents of Rita Roe were known to oppose abortion for religious and moral reasons unpersuasive to her. She feared a repetition of past physical brutality from her alcoholic father if the pregnancy became known to him. Patricia Noe had obtained an abortion with parental consent eight months earlier. At that time her parents denied her access to contraceptives and threatened to send her away should she again become pregnant.

Dr. Carmichael alleged that the spouse and parental consent requirements abridged his right to administer health care and his patients' rights of privacy. Both statutory clauses affected him on a regular and recurring basis.

The three-judge district court, applying *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Doe* v. *Bolton*, 410 U.S. 179 (1973), invalidated both the spousal and parental consent statutes. *Coe* v. *Gerstein*, 376 F.Supp. 695 (S.D. Fla. 1974) (per curiam). This was the first decision by a federal court on these important questions, and prompted similar litigation across the United States.

After appeals to this court were resolved on issues other than the merits, the case returned to the Fifth Circuit. An exhaustive opinion by Circuit Judge Morgan held both the spousal and parental consent statutes unconstitutional. The State of Florida then brought this appeal.

The Court should note probable jurisdiction over this appeal as pertains to spouse consent for much the

same reasons that were advanced in *Bellotti* v. *Baird*, Nos. 75-73, 75-109, on parental consent.

First, this case was the genesis of spousal-parental consent litigation, and comes to the Court with a substantial record and two exhaustively reasoned lower court determinations.

Second, while spousal and parental consent issues, along with a great many others, appear to be presented by *Planned Parenthood* v. *Danforth*, Nos. 74-1151 & 74-1419, separate consideration of this appeal would enable the Court to focus more directly upon the very significant constitutional problems of conflicts among the competing interests of pregnant women, spouses, parents, family, and the State.

The spousal and parental consent issues are too important to be caught up in the many substantive and jurisdictional problems of the *Danforth* cases. They were not given two pages in the *Planned Parenthood, et al.*, Jurisdictional Statement in No. 74-1151. No *patients* directly contesting third party consent clauses were even parties in *Planned Parenthood* v. *Danforth, supra.*

Finally, the Florida spouse consent clause, FLA. STAT. ANN. § 458.22(3)(a), unlike that in Missouri, contains an exception. Consent in Florida is not required when the spouse "is voluntarily living apart from the wife ...." The result in *Danforth*, therefore, will not necessarily reach the more complex Florida statute.

ARGUMENT

I. The Spousal Consent Provision of the Florida Abortion Law, Fla. Stat. Ann. § 458.22, Abridges a Pregnant Married Woman's Individual Fourteenth Amendment Right of Privacy by Authorizing Her Spouse, for Any Arbitrary Reason or None At All, To Veto Her Access To Necessary Medical Care, Regardless of Medical Needs, Rape, Impending Divorce, or Her Physical and Mental Condition.

The decision of the Court of Appeals thoroughly examined the contentions of both parties and concluded that the spousal consent provision of the Florida abortion law was unconstitutional. *Poe* v. *Gerstein*, 517 F.2d 787, 795-797 (5th Cir. 1975). With one short-lived exception [1] this has been the unanimous view of the lower courts. *See, e.g., Word* v. *Poelker*, 495 F.2d 1349, 1354 (8th Cir. 1974); *Doe* v. *Bellin Memorial Hosp.*, 479 F.2d 756, 759 (7th Cir. 1973) (Stevens, Cir. J.); *Planned Parenthood* v. *Fitzpatrick*, 401 F. Supp. 554, 564-566 (E.D. Pa. 1975) (three-judge court); *Wolfe* v *Schroering*, 388 F. Supp. 631, 636-637 (W.D. Ky. 1974) (three-judge court); *Doe* v. *Rampton*, 366 F. Supp. 189 (D. Utah 1973) (three-judge court); *Coe* v. *D. C. General Hosp.*, Civ. No. 1477-71 (D.D.C. June 5, 1972); *Doe* v. *Doe*, 1974 Mass. Adv. Sh. 1089, 314 N.E.2d 128 (1974); *Jones* v. *Smith*, 278 So. 2d 339 (Fla. D. Ct. App. 1973), *cert. denied*, 415 U.S. 958 (1974).

The language and reasoning of *Roe* v. *Wade, supra,* and its progeny, strongly support the determination of the Fifth Circuit. The Florida spousal consent provision takes away from married women the rights enunciated in *Roe*. For that reason, the judgment below should be affirmed.

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[1] Planned Parenthood v. Danforth, 392 F. Supp. 1362 (E.D. Mo.) (three-judge court), *stay granted*, 420 U.S. 918, *prob. juris. noted*, 46 L.Ed.2d 36 (1975) (Nos. 74-1151 & 74-1419).

II. The Parental Consent Provision of the Florida Abortion Law, Fla. Stat. Ann. § 458.22, Abridges a Pregnant Minor Woman's Individual Fourteenth Amendment Right of Privacy by Authorizing Her Parents, for Any Arbitrary Reason or None At All, To Veto Her Access To Necessary Medical Care, Regardless of Rape, Incest, Her Medical and Personal Needs, or Her Individual Maturity.

The decision of the Court of Appeals also exhaustively examined all opposing contentions in concluding that the parental consent clause of the Florida abortion law was unconstitutional. *Poe* v. *Gerstein,* 517 F.2d 787, 789-794 (5th Cir. 1975). Again, with the exception of the *Danforth* [2] case, the lower courts have unanimously invalidated parental consent to abortion statutes or regulations. *See, e.g., Word* v. *Poelker,* 495 F.2d 1349, 1354 (8th Cir. 1974); *Doe* v. *Exon,* -- F. Supp. —, Civ. No. CV 75-L-146 (D. Neb. Oct. 8, 1975) (three-judge court); *Planned Parenthood* v. *Fitzpatrick,* 401 F. Supp. 554, 566-567 (E.D. Pa. 1975) (three-judge court); *Baird* v. *Bellotti,* 393 F. Supp. 847 (D. Mass.) (three-judge court), *prob. juris. noted,* 46 L.Ed.2d 301 (U.S. 1975) (Nos. 75-73 & 75-109); *Foe* v. *Vanderhoof,* 389 F. Supp. 947 (D. Colo. 1975); *Gary-Northwest Indiana Women's Services* v. *Bowen,* — F. Supp. —, Civ. No. H-74-289 (N.D. Ind. Jan 3, 1975) (three-judge court); *Wolfe* v. *Schroering,* 388 F. Supp. 631, 636-637 (W.D. Ky. 1974) (three-judge court); *Doe* v. *Rampton,* 366 F. Supp. 189 (D. Utah 1973) (three-judge court); *State* v. *Koome,* 84 Wash. 2d 901, 530 P.2d 260 (1975); *cf. Ballard* v. *Anderson,* 4 Cal. 3d 873, 95 Cal. Rptr. 1 (1971).

The language and reasoning of *Roe* v. *Wade, supra,* and subsequent decisions support the judgment of the

[2] Planned Parenthood v. Danforth, *supra.*

Fifth Circuit in this case. There are no narrowly drawn compelling state interests which justify denying to minors the rights protected by *Roe.*

CONCLUSIONS

For the reasons set forth above, the Court should note probable jurisdiction and affirm the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

ROY LUCAS
Attorney for Appellees.

Of Counsel:
JOSEPH P. FARINA